

(1998) 10 PAT CK 0031

In the Patna High Court

Case No : Criminal Revision No. 830 of 1989

R.P. Sharma and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 09-10-1998

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 47, 49, 55, 56, 7(2)
Criminal Procedure Code, 1973 (CrPC) — Section 132, 190, 190(1), 193, 194
Penal Code, 1860 (IPC) — Section 395, 79

Citation : (1998) 3 PLJR 733

Hon'ble Judges : Nagendra Rai, J;B.P. Sharma, J

Bench : Division Bench

Advocate : Ganga Prasad Bimal, for the Appellant; G.R. Jaiswal, for the Respondent

Final Decision : Allowed

Judgement

Nagendra Rai, J.—The Petitioners, four in number, have filed the present application for quashing their prosecution u/s 47(a) of the Excise Act and also for quashing the order dated 8.9.1989 passed by the Chief Judicial Magistrate, Siwan, in Case No. CII-182/87 rejecting their application to drop the proceeding on the ground of its being barred by limitation in view of the provision contained in Section 96 of the Bihar Excise Act, 1915 (hereinafter referred to as the Act").

2. The facts giving rise to the filing of the present application are that Petitioner No. 1, namely, R.P. Sharma, is the Manager of Precious Carrying Corporation Ltd. Hajiganj Patna City (for short Corporation") Petitioners No. 2 and 3, namely, Jsliranjan Singh alias Bhandariji and Laxmi Prasad Yadav are the, owners of the trucks, bearing registration Nos. BPA-8455 and BPP 3215, respectively and Petitioner No. 4 is the driver of Truck No. BPA-8455. The District Excise-Officer, issued an import permit on 19.5.1987, which was valid up to 18.6.1987, in favour of M/s McDowell and Co. Ltd., Lucknow, for importing India made foreign liquor (for short "IMFL") from the McDowell and Co. Ltd., Hathidah. The validity

of the said import permit was extended upto 25.9.1987. On the basis of the import permit, an export permit dated 16.9.1987 was issued by the Excise Superintendent posted at the McDowell and Co. Ltd., Hathidah, for exporting 4387.40 L.P Litres of IMFL to the said M/s McDowell and Co. Ltd., Lucknow. On 19.9.1987, a transport permit was issued by the Distillery Officer, McDowell and Co, Ltd., Hathidah for export of the aforesaid quantity of IMFL contained in 662 cartons by truck No. BPP 3295. On 28.9.1987, at Guthani Check post in the district of Siwan, truck No. BPA 8455 was found carrying 662 cartons of IMFL and the same was detained by the Excise Officials and on scrutiny, it was found³ that the same was carried in violation of export permit No. 366 dated 16.9.1987 and the excise transport permit dated 19.9.1987. The export permit was valid up to 25.9.1987 and the aforesaid quantity of IMFL: was. carried on 27.9.1987 by a vehicle, for which no transport permit was granted, as the transport permit was granted in respect of truck No. BPP 3295. Thus, the driver and the owners of the said vehicles have committed an offence punishable u/s 47(a) of the Act. The Sub-Inspector of Excise proceeded with the investigation and submitted a prosecution report dated 9.4.1989 in terms of Section 78(4) of the Act, which was received in the court of the Chief Judicial Magistrate on 22.4.1989, on the basis of which cognizance was taken on 9.6.1989 u/s 47 of the Act.

3. The Petitioners challenged their, prosecution before this Court in Criminal Revision No. 334 of 1989 and the said application was permitted to be withdrawn and the Petitioners filed an. application before the court below to drop the proceeding on the ground of its being barred by limitation which has been rejected by the impugned order dated 8.9.1989, which has been challenged in this application. The matter was placed before a learned Single Judgeⁱ of this Court and it was submitted that as the cognizance has been taken after expiry of six months from the date of the act complained of the same is vitiated in law. In support of the submission, reliance was placed on two judgments rendered by the learned Single Judges of this Court in the, case of Shankar Prasad Choudhary v. State of Bihar, reported in 1978 B.L.J.R. 645 as well as in the case of Bishwanath Mandal v. State of Bihar, reported in 1979 B.B.C.J, 169. The learned Single Judge doubted the propositions of law laid down in the aforesaid two judgments and referred the matter to a Division Bench and it is how the matter has come up before us.

4. Learned Counsel for the Petitioners submitted that in terms of the provisions contained in Section 96 of the Act, the cognizance has to be taken within six months after the date of the act complained of In this case, the date of the act complained of is 28.9.1987, whereas, the cognizance has been taken on 9.6.1989 and as such the same is barred by limitation. In support of his submission, he relied upon the aforesaid two decisions as well as upon an unreported order/ judgment passed by me on 27.4.1994 in Cr. Misc. No. 2597 of 1994 (Fojo Singh and Anr. v. State of Bihar), wherein relying upon the aforesaid two decisions, I had quashed the prosecution on the ground that the cognizance was taken beyond six months after date, of the act complained of.

5. Learned Counsel for the State submitted that the only requirement u/s 96 of the Act is that the prosecution report is to be filed within six months after the date of the act complained of and there is no requirement u/s 96 of the Act that the cognizance shall be taken within six months after the date of the act complained of. The view taken by this Court in the aforesaid three cases is against the provisions contained in; the said section" of the Act.

6. Before advertng to the submissions advanced at the Bar, it will be apt to state the relevant provisions of the Act having relevancy in deciding the question referred to above. Section 87 of the Act contains a provision with regard to initiation of certain prosecutions. It provides, inter-alia, that no Magistrate shall take cognizance of an offence referred to in Sections 47, 49, 55 and 56 of the Act, except on his own knowledge or suspicion or on the complaint or report of an Excise Officer or an officer empowered in this behalf by the State Government. Section 7(2) of the Act empowers the State Government to appoint by notification an officer of the Excise Department of such classes, and with such designations, powers and duties as it may think fit. Section 7(2)(d) empowers the State Government to order that all or any of the powers and duties assigned by or under the Act to any officer appointed under clause(c) of this section, shall be exercised and performed by any Government Officer or any other person.

7. In pursuance of the aforesaid provision, the State Government issued notification No. 470-F dated 15.1.1919. which was published in Part II of the Bihar and Orissa Gazette dated the 22nd of January, 1919, empowering the Police Officers, not below the rank of an Officer-in-charge of a Police Station," to exercise powers under different sections of the Act, including power of investigation etc This power includes investigation of offences punishable u/s 47 and other sections and filling of reports to the Magistrate etc.

8. Section 77 of the Act contains the; provision with regard to investigation: of offences by the Excise Officers. It provides that the Collector or any other officer specially empowered in this behalf by the State Government"may investigate the offence punishable under the Act without the order of the Magistrate within the jurisdiction mentioned in the said section. Section 78 contains a provision with regard to powers and duties of Excise Officer investigating offences. Sub-section (4) of Section 78 provides that as soon as investigation by a Collector or by an Excise Officer empowered u/s 77(2), has been completed and if it appears that there is sufficient evidence to justify the forwarding of the accused to a Magistrate, then the Investigating Officer shall submit a report to a Magistrate having jurisdiction to enquire into or try the case and empowered to take cognizance of offences on police reports. It is also provided that the said report shall be treated to be a police report for the purpose of Section 190 of the Code of Criminal Procedure (for short "Code").

9. Limitation for filing suits and prosecutions is provided u/s 96 of the Act and the said provision runs as follows:

96. Limitation of suits and prosecution.-No Civil Court shall try any suit against the Government in respect of anything done, or alleged to have been done, in pursuance of this Act, and except with the previous sanction of the State Government, no Magistrate shall take cognizance of any charge made against any Excise Officer under this Act or any other law relating to the excise-revenue or made against any other person under this Act, unless the suit or prosecution is instituted within six months after the date of the act complained of.

10. A brief resume of the aforesaid provisions shows that the officers mentioned in the Act are authorised to investigate an offence and after completion of the investigation to submit a report u/s 78(4) of the Act, which is to be treated as a Police report within the meaning of Section 190 of the Code. The Magistrate is empowered to take cognizance with regard to offences punishable under Sections 47, 49, 55 and 56 of the Act on the basis of complaint or report of an Excise Officer empowered in this behalf by the State Government. With regard to initiation of the prosecutions, it is provided, inter-alia, that no Magistrate shall take cognizance of any charge made against any Excise Officer or any other person under this Act or any other law unless the prosecution is instituted within six months after the date of the act complained of.

11. Section 96 of the Act does not provide that the cognizance is to be taken within six months of the act complained of. It provides that the prosecution has to be instituted within the aforesaid period. The question for consideration is as to when the prosecution is instituted. The meaning of the word has to be gathered with due regard to the background and context in which it is used. It has different meaning in different context. The word "prosecution" means criminal proceeding in general as it includes institution, continuance and culmination of proceeding in final judgment. In Section 96 of the "Act, the word "prosecution" is followed by the word "instituted" and as such this word has been used in the context of institution of the criminal prosecution. The word "institute" means when the information is laid or complaint is made (See *Thorpe v. Priestnall* (1897) 1 Q.B. 159), printed at Page 1314 *Stroud's Judicial Dictionary*, 5th Edition(3). The said word when applied to judicial proceeding means commencement of the same (see *Baugh v. Little*-282, P.-459, printed at Page-665 of *Words and Phrases*, Permanent Publication).

12. In my view, the word "instituted" has been used in Section 96 to mean only filing of the report or the complaint before the court. It does not mean taking of cognizance of the offence. It is specifically provided in the section that the cognizance is to be taken only if the prosecution is instituted within six months after the date of the act complained of. If the legislature intended that the cognizance is to be taken within six months, then it would have been provided that the cognizance is to be taken within six months from the date of the act complained of and there was no need to use the words "prosecution is instituted" in the section within the aforesaid period. Thus, the institution of the prosecution within the meaning of the said section cannot be treated to mean taking of

cognizance of the offence in terms of Section 190 of the Code.

13. In the case of Shankar Prasad Choudhary (supra), the accused persons had challenged their prosecution u/s 47(a), of the Act. In the said case, the date of the act complained of was 20.5.1975 and the report was put up before the Chief Judicial Magistrate on 28.11.1975, who took cognizance on the same day. The learned Single Judge held on the basis of the concession made by the State counsel that the report was presented and the cognizance was taken beyond time and as such quashed the prosecution. The question as to whether mere filing of the report in the office of the Sub-Divisional Judicial Magistrate would or would not amount to an institution of a case in terms of Section 96 of the Act, was not decided.

14. In Bishwanath Mandal's case (supra), it was held that the word "prosecution is instituted" means cognizance of the offence taken by the Magistrate and in that case as cognizance was taken beyond six months from the date of the occurrence, the same was quashed. The learned Single Judge relied upon two judgments of the Supreme Court for coming to the aforesaid conclusion, namely, (i) Jamuna Singh and Others Vs. Bhadai Sah, and (ii) Nagraj Vs. State of Mysore, .

15. In Jamuna Singh's case (supra), the question for consideration was as to when a case is instituted upon a complaint ? In the said case, a complaint was filed before the Sub-Divisional Magistrate and the Magistrate, after examining the complainant on solemn affirmation, made an order to the Sub-Inspector of Police to institute a case and, thereafter, the charge-sheet was submitted and the accused persons were put on trial and they were acquitted. The complainant filed an appeal u/s 417(3). of the Code of Criminal Procedure, 1898 and the appeal was allowed by the High Court and the accused were convicted u/s 395 of the Indian Penal Code and sentenced to two years' rigorous imprisonment. It was submitted before the apex court that the appeal against the order of acquittal was not maintainable as the case was instituted on a Police report and not on complaint. The said submission was negatived and it was held that as the Magistrate had taken cognizance on complaint and, thereafter, sent the matter to the Police, the case was instituted on a complaint. In that context, in paragraphs 6 and 7 of the said judgment, it was held as follows:

(6) The Code does not contain any definition of the words "institution of a case". It is clear however and indeed not disputed that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. Section 190(1) of the Code of Criminal Procedure contains the provision for cognizance of offences, by Magistrates. It provides for three ways in which such cognizance can be taken. The first is on receiving a complaint of facts which constitute such offence; the second is on a report in writing of such facts that is, facts constituting the offence -made by any police officer; the third is upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed.

Section 193 provides for cognizance of offences being taken by Courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf. Section 194 provides for cognizance being taken by High Court of offences upon a commitment made to in the manner provided in the Code.

(7) An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report." 13. In my view, the said decision has got no relevancy to decide the question in controversy in the present case. The aforesaid observation was made by the apex court in a quite different context. There, the question for consideration was as to when the case is to be treated to have been instituted as a complaint for the purpose of deciding the maintainability of the appeal. The appeal was maintainable only when the case was instituted on complaint. In that situation, it was held that unless the cognizance was taken on the basis of the complainant, the case could not be said to be instituted. In this case, as stated above, Section 96 of the Act specifically provides for institution of prosecution within a particular period for the purpose of taking cognizance and as such it cannot be said that the institution of the prosecution means the same thing as taking of cognizance.

14. In the case of Nagraj (supra), the question for consideration was as to whether the Appellant could be prosecuted without valid sanction under Sections 132 and 197 of the Code. The apex court held in the facts of the said case that on the basis of the accusation, no sanction was required. The question as to when the case shall be treated to have been instituted in a criminal court was not decided in the said case. In Bishwanath Mandal's case (supra), at paragraph No. 9 of the judgment, the learned Single Judge, had relied upon the following observation made in paragraph 17 of the judgment in Nagraj's case (supra):

Section 79, I.P.C. deals with circumstances which, when proved makes acts complained of not an offence. The circumstances to be established to get the protection of Section 132, Code of Criminal Procedure and not circumstances which make the acts complained of no offence, but are circumstances which require the taking cognizance of a complaint with respect to the offences alleged to have been committed by the accused.

The said observations were made by the apex court in paragraph 17 while deciding the question as to what the accused has to show in order to get the benefit of the provisions of Section 132 the Code. The case is an authority with regard to the point decided in it. It is not a precedent on the point, which is not decided.

Thus, none of the aforesaid two cases is an authority on the point that the institution of the prosecution, is synonymous "with the taking of cognizance. The

view taken in the aforesaid two cases that unless the cognizance is taken within six months from the date of the act complained of, the prosecution is barred by limitation, is not a correct view. The requirement of the said section is that the prosecution is to be instituted meaning thereby the report of the complaint is to be filed in terms of Section 78(4) of the Act within six months of the act complained of. The cognizance may be taken even beyond the period of six months.

16. Thus, the point raised on behalf of the Petitioners in this case has no substance and the same is to be rejected. However, from the perusal of the record, it appears that in this case, the date of the act complained of is 28.9.1987 and the prosecution report was filed in the court of the Chief Judicial Magistrate on 22.4.1989. Thus, the report was filed beyond the period of six months and as such the cognizance taken on the basis of the said report is vitiated in law as the same is in breach of the provision contained in Section 96 of the Act.

17. In the result, this application is allowed and the prosecution of the Petitioners u/s 47(a) of the Act is quashed.

B.R Sharma, J.

I agree.